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Opinion Announcements

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TOPIC 3

JOURNALISTS' INSIGHTS

OPINION ANNOUNCEMENTS

TONY MAURO*

Tension was in the air at the U.S. Supreme Court on the morning of June 28, 2012, when Chief Justice John Roberts Jr. said matter-of-factly to the crowded courtroom, “I have the announcement in case number 11-393, *National Federation of Independent Business versus Sebelius*, and the related cases.”¹

Finally, the court was about to declare the fate of the biggest piece of domestic legislation Congress had passed in decades: the Patient Protection and Affordable Care Act of 2010—dubbed derisively as “Obamacare” by its critics, though President Barack Obama eventually embraced the nickname.²

For the next twenty minutes and twenty-five seconds, Justice Roberts summarized the ruling orally, from the bench. The fact that Roberts devoted so much time to the announcement was but one sign that he viewed it as an important tool for explaining the court’s momentous decision to the public. His words were carefully chosen, and anyone listening would have come away with a clear understanding that the court had upheld most features of the law. While agreeing that the so-called individual mandate, requiring individuals to purchase a minimum level of health insurance, exceeded the power of Congress under the commerce clause, a majority upheld the mandate as an exercise of Congress’ taxing power.³

And yet, as dramatic and meaningful as the announcement was, it fell on very few ears. As with all of the Court’s proceedings, the opinion announcement was not broadcast live on television or radio. Yet, unlike oral arguments, neither the audiotape nor a transcript of the opinion announcement was made available to the public until nearly three months later—and even then, the Court did not make the release. It was

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1. *The Affordable Care Act Cases*, THE OYEZ PROJECT AT IIT CHICAGO-KENT COLLEGE OF LAW, http://www.oyez.org/cases/2010-2019/2011/2011_11_400 (last visited March 7, 2013).

2. Janet Adamy, *Obama Embraces ‘Obamacare’*, WSJ BLOGS (Mar. 23, 2012, 5:58 PM), <http://blogs.wsj.com/washwire/2012/03/23/obama-embraces-obamacare/>.

3. *Nat’l. Fed’n. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2591-2600 (2012).

the Oyez Project that plucked Roberts' oral summary from the Court's official archival audiotape of that day's proceedings, which was available from the National Archives long after the term of the court ended.⁴

The only people seeing and hearing Roberts speak were those who sat in the court chamber to view history in the making. Numbering 250 or so⁵, the audience included dozens of reporters who had the interest or luxury of time to listen to Roberts, as well as one concurring and one dissenting justice summarize their opinions. The audio of Roberts' announcement was piped into the Court's public information office, where reporters with tighter deadlines could hear the announcement at the same time they were handed printed copies of the opinion.⁶ But, given the constant demands of digital deadlines, reporters who could have listened to the announcement in this way had already left the room to frantically read, and then report on, the court's decision—all 193 pages of it.⁷ Some of them, famously, got it wrong.⁸

This essay will examine the rarely discussed tradition of Supreme Court opinion announcements and their role in the interplay between the court, the public and the news media.⁹ Ample evidence through history shows that justices themselves view their opinion announcements as highly important.¹⁰ But the almost-complete invisibility of those announcements, as described above, raises a variation on the "tree falling in the forest" question: if almost no one hears or sees opinion announcements, do they matter? More constructively, the essay will consider whether, with changes, opinion announcements could play a more useful role in enhancing public understanding of the Court.

4. *All 2011 Opinion Announcements Available*, OYEZ TODAY AT IIT CHICAGO-KENT COLLEGE OF LAW (Oct. 16, 2012, 4:02 PM), http://www.oyeztoday.org/news/all_2011_opinion_announcements_available.

5. *How the Court Works—Visiting the Court*, SUPREME COURT HISTORICAL SOCIETY, <http://www.supremecourthistory.org/how-the-court-works/how-the-court-work/visiting-the-court/> (last visited Mar. 8, 2013).

6. Email from S. Ct. Public Information Office (on file with author).

7. Tom Goldstein, *We're Getting Wildly Differing Assessments*, SCOTUSBLOG (Jul. 7, 2012, 10:04 PM), <http://www.scotusblog.com/2012/07/were-getting-wildly-differing-assessments/>.

8. *Id.*

9. Considerable scholarly attention has been paid to oral dissents made by justices, which, of course, are the other side of the coin of opinion announcements. See Christopher W. Schmidt and Carolyn Shapiro, *Oral Dissenting on the Supreme Court*, 19 WM. & MARY BILL RTS. J. 75 (2010); Lani Guinier, *The Supreme Court 2007 Term—Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4 (2008); Jill Duffy & Elizabeth Lambert, *Dissents from the Bench: A Compilation of Oral Dissents Issued by U.S. Supreme Court Justices*, 102 LAW LIBR. J. 7 (2010). Many of the points made in these articles about the explanatory and educational value of oral dissents are equally relevant when applied to opinion announcements.

10. *Infra* pp. 479-80.

Justices of the Supreme Court have announced their opinions from the bench “since the first decision of the Supreme Court in 1792.”¹¹ Issuing written opinions, announced by the justices who wrote them, was viewed as a form of accountability that helped safeguard against mistakes. In 1936, Chief Justice Charles Evans Hughes wrote, “[t]he practice of fully stating the case in the opinion has contributed in no slight degree to the influence and prestige of the Supreme Court.”¹² Hughes wrote that for a period in the early days of the court, the Chief Justice delivered Court opinions, regardless of which justice authored them.¹³ Thomas Jefferson objected, according to Hughes, to opinions “huddled up in conclave, perhaps by a majority of one, delivered as if unanimous, and with the silent acquiescence of lazy or timid associates, by a crafty chief judge.”¹⁴

Until 1857 the Court announced opinions from the bench on any day when the court was in session. But in that year, the Court began a tradition of “decision Mondays,” announcing rulings only on that day.¹⁵ That changed again in 1971, when the Court began issuing opinions at the beginning of sessions at which oral arguments were heard. By longstanding custom, the Court does not announce beforehand which pending decisions it will hand down on any given day.¹⁶

For most of the Court’s history, the norm was for justices to read their opinions aloud in full, often including footnotes. The announcement of *Smith v. Turner* and *Norris v. Boston*, the so-called Passenger Cases, in 1849 was “typical,” according to political scientist David O’Brien.¹⁷ “More than seven hours passed by the time all nine justices had read aloud their separate opinions.”¹⁸

Devotion of this amount of time to announcing opinions is a sure sign of the importance that justices attached to the ritual. But it produced undeniable tedium in the court chamber on many occasions. A 1936 critique of the Court entitled *The Nine Old Men* described the scene on one of the first days the justices convened at their newly opened court building:

11. BERNARD SCHWARTZ, DECISION 63 (1996).

12. CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES 64 (1936).

13. *Id.*

14. *Id.*

15. DAVID O’BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 349-50 (3d. ed. 1993).

16. *Id.* at 350.

17. *Id.*

18. *Id.*

Chief Justice Hughes nods to Justice Cardozo at the extreme left, and Justice Cardozo launches a long opinion on building-and-loan associations. Newsmen stuff messages into the pneumatic tubes to be carried to the telegraph room on the floor below... Opinion after opinion drones on: Indian property, workmen's compensation, mortgages, garbage disposal. The expectant audience is bored.¹⁹

Over the years, some justices began summarizing their opinions in the interest of saving time, triggering occasional conflict over how accurate the summaries were.²⁰ No longer tethered to the text of the decision, justices sometimes articulated arguments and rationales that were not part of the actual opinion.²¹ Justice William O. Douglas wrote about one such occasion:

Once Frankfurter, speaking for the Court, ad-libbed at length, giving reasons for the opinion that had no resemblance to the opinion. As we walked out, Stone said, "By God, Felix, if you had put all that stuff in the opinion, never in my life would I have agreed to it."²²

Even as late as Chief Justice Earl Warren's last term in 1968 and 1969, the reading of opinions took up entire days on the court's calendar.²³ Justices William O. Douglas and Hugo Black tried to limit opinion announcements, advocating a return to the older practice of the chief justice briefly announcing the outcomes and the lineup of justices on both sides. "That aroused Felix Frankfurter's vehement opposition," Douglas later wrote.²⁴ "He maintained that the oral announcements put the public on a wavelength with the justices and gave them a better idea what kind of persons the justices are. The arguments on this were long and passionate, and a majority took Frankfurter's view."²⁵

The late John Frank, a noted legal scholar and court advocate, also defended the practice of announcing court decisions from the bench. "This is a remarkable proceeding; a busy institution interrupts pressing work in order to tell a handful of persons in the courtroom what everyone else in the country necessarily learns by reading," Frank wrote:²⁶

On opinion days... from thirty minutes to four hours may sometimes be taken in making these announcements. In the extreme case

19. DREW PEARSON & ROBERT S. ALLEN, *THE NINE OLD MEN* 10-11 (1936).

20. WILLIAM O. DOUGLAS, *THE COURT YEARS* 40 (1980).

21. *Id.*

22. *Id.*

23. O'BRIEN, *supra* note 15, at 350.

24. CLARE CUSHMAN, *COURTWATCHERS: EYEWITNESS ACCOUNTS IN SUPREME COURT HISTORY* 116 (2011).

25. *Id.*

26. *Id.*

this means that as much as twenty percent of the courtroom time for a week may go into these statements, all of which would be as effective if the justices simply handed them to the official reporter. Nonetheless, this ceremony is deeply gratifying to those who see it.²⁷

Nevertheless Warren Burger, who became Chief Justice in 1969, tried mightily to end the practice of opinion announcements altogether. He did not win the argument, but did finally persuade justices to summarize their opinions rather than reading them verbatim.²⁸ Justices adopted different styles in their opinion announcements, and some opinion announcements were still lengthy. The court took sixty-four minutes in 1978 to announce the complex affirmative action decision in *Regents of the University of California v. Bakke*.²⁹ Perhaps more clearly than the opinion itself, Justice Lewis Powell Jr. explained that no single opinion was supported by a majority of the court.³⁰

To the frustration of some, when Justice Byron White announced his opinions, he would offer none of the facts or legal rationale of the decisions he announced, tersely telling the audience that “for the reasons stated in an opinion that I have filed,” the court had reversed or affirmed the lower court ruling.³¹ White made exceptions when he felt his opinion or dissent was of particular importance. After Chief Justice Burger announced the opinion in the legislative veto case, *INS v. Chadha* in 1983, Justice White read his dissent aloud, telling spectators “this is probably the most important case the court has handed down in many years.”³²

The only recent changes in opinion announcements have been behind the scenes. In 1998, the Court allowed the opinion announcements to be piped in to the Court’s public information office, so that reporters whose deadlines demanded that they get the written opinions quickly could also hear the justices’ oral summaries.³³ In the mid-1990s, Justice Ruth Bader Ginsburg began making available to the

27. *Id.*

28. O’BRIEN, *supra* note 15, at 350.

29. Opinion Announcement, *Regents of The Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (No. 76-81), available at http://www.oyez.org/cases/1970-1979/1977/1977_76_811#opinion.

30. *Id.*

31. Stuart Taylor, *And Now... the Supremes!*, LEGAL TIMES (July 3, 1989), <http://stuarttaylorjr.com/content/and-now-supremes>.

32. DENNIS J. HUTCHINSON, THE MAN WHO ONCE WAS WHIZZER WHITE, A PORTRAIT OF JUSTICE BYRON R. WHITE 397 (1998).

33. Memorandum and email from the court’s public information office to author (on file with author).

press the text of her opinion announcements.³⁴ Justice Antonin Scalia followed suit beginning in 2009.³⁵ In both instances, the Court stressed that this release was for the convenience of the press in reporting on their remarks from the bench, and not for publication.³⁶ As with the syllabus prepared by the Court's Reporter of Decisions for each ruling, the Court did not want anyone to be citing the oral summaries as if they were part of the decision.³⁷

The ritual of opinion announcement remains popular with the public. A representative of the U.S. Solicitor General's office is, in my longtime personal observation, always or almost always in the Court chamber when opinions are announced, as if the announcement—not the written opinion—were the official means of transmission of decisions to interested parties. Many journalists who cover the Court watch the opinion announcements as they occur, even though they could receive the written opinions in the court public information office the moment the announcement begins. "I like the pageantry of that," said longtime court reporter Joan Biskupic.³⁸ "I like to hear the justice himself or herself announce what's in the opinion and also to potentially hear a dissenting justice explain why he or she does not like that majority opinion."³⁹

Even though, as previously mentioned, the Court does not announce in advance which opinions it will hand down on a given day, advocates involved in particular cases often go to the courtroom just in case. Toward the end of the term, through the process of elimination, the odds increase that an advocate will be rewarded for attending by hearing his or her case announced. On June 26, 2003, gay rights advocates were in the court and wept openly as Justice Anthony Kennedy announced the court's landmark opinion in *Lawrence v. Texas*.⁴⁰ They too could have opted to get the written opinion downstairs, but they chose to view history in the making.

This brief history makes it clear that since the Court's founding, justices have treated opinion announcements as an important part of their public roles. Justices tailor their announcements according to the

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. CUSHMAN, *supra* note 25, at 117.

39. *Id.*

40. Nancy Gibbs, *A Yea for Gays*, TIME MAGAZINE (July 7, 2003), <http://www.time.com/time/magazine/article/0,9171,1005162,00.html>.

importance of the decision, and for other reasons, with an eye toward history and the citizenry. Yet it is also clear that the effectiveness of this avenue of communication is very limited because the audience, for all practical purposes, is limited to the mostly random spectators in the courtroom on that day.

A range of changes in the practice of opinion announcements, some of them modest, could considerably increase their public value. Releasing the audio and/or transcript of the announcements in roughly the same way that oral argument transcripts and audio are released – within hours or day of their occurrence—is one way the announcements could be more widely circulated. As mentioned, justices may have some reluctance about this because they do not want the summary announcements to be viewed as an official part of the opinions themselves. But this concern could be easily dealt with by a disclaimer from the Court, similar to the disclaimer that accompanies the written syllabus preceding the written decisions themselves: “The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader.”⁴¹

Justices may also fear that giving opinion announcements wider circulation will encourage justices to add their own biased “spin” to the summaries to persuade the public that their views are right and the dissenters are wrong. The fact is, opinion announcements by their very nature are already selective summaries that emphasize the justice’s favorite points. If anything, wider exposure would probably encourage justices to make their summaries more accurate and less rhetorical, for fear of embarrassment or accusations of “spin control.”

The announcement of the Affordable Care Act cases in June points to another possible change: releasing the written opinions only after the oral summaries are delivered. There is no question that anyone listening to Roberts’ oral recitation from start to finish would have understood that the court had upheld the individual mandate. Some of those journalists who did not listen to the announcement, but instead raced to report on the written opinion as they were reading it, got it wrong. It may seem counter-intuitive to suggest that an oral summary would produce more accurate reporting than the written opinion itself. But perhaps the combination of the two—the oral summary first, followed by the printed opinion—would enhance understanding of the decision. Oral presentations are often more comprehensible than writ-

41. See, e.g., *Smith v. U.S.*, No. 11-8976 (S. Ct. Jan. 9, 2013) (see note at top), available at http://www.supremecourt.gov/opinions/12pdf/11-8976_k5fl.pdf.

ten ones, as Justice Oliver Wendell Holmes once suggested. He told a colleague that Supreme Court opinions should not be “essays with footnotes,” urging him instead to think of opinions as “theoretically spoken.”⁴²

The surest way of maximizing the effectiveness and reach of opinion announcements would be to allow them to be broadcast, either live or on a delayed basis. The Court, of course, has long rejected proposals for the live video or audio broadcast of any of its proceedings in any form.⁴³ But some of the concerns justices have expressed about broadcasting oral arguments would not pertain to opinion announcements. Justices have expressed fear that broadcast of oral arguments could upset the dynamics among the justices and between the justices and the advocates before them.⁴⁴ Since only one justice announces an opinion, those dynamics would be undisturbed. Some justices have also said that oral arguments exist for the benefit of the justices seeking to understand the case, not for the education of the public.⁴⁵ But opinion announcements, from the outset, have had as their sole purpose informing the public. Broadcasting them would only further that goal. The Court could also view broadcast of opinion announcements as an experiment that would help the Court evaluate whether it should then take the bigger step of broadcasting oral arguments.

What surely would be enhanced by broadcast of opinion announcements is public understanding of the Court’s decisions. Innumerable polls have found a low level of familiarity with the court—its justices and its processes.⁴⁶ Wider public access to the court’s opinion announcements would make the court, its justices, and most importantly its decisions, more familiar and understandable to the public. And in my view, it would be consistent, not at odds with, a tradition of public accountability that goes back to the Supreme Court’s earliest days.

42. Guinier, *supra* note 9, at 27.

43. Anthony E. Mauro, *Let the Cameras Roll: Cameras in the Court and the Myth of Supreme Court Exceptionalism*, 1 REYNOLDS CT. & MEDIA L.J. 259 (2011).

44. See *Cameras in the Court*, C-SPAN, <http://www.c-span.org/The-Courts/Cameras-in-The-Court/> (last visited Mar. 8, 2012) (comments by Justices Alito and Kennedy).

45. Mauro, *supra* note 43, at 273.

46. *Supreme Court/Judiciary*, POLLINGREPORT, <http://www.pollingreport.com/court.htm>.